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IN THE

Supreme Court of the United States

MIGUEL ANGEL PEÑA RODRIGUEZ,

Petitioner,

v.

STATE OF COLORADO,

Respondent.

On Writ of Certiorari
to the Colorado Supreme Court

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Laced throughout the State's brief is a simple premise: that racial prejudice is no worse than other forms of bias. It would be "arbitrary," and "treat defendants unequally," the State asserts, to mandate a constitutional exception to no-impeachment rules for racial animus but not for other forms of partiality. Resp. Br. 49, 54; *see also id.* at 3-4, 18-19.

The State's premise is wrong. The Constitution—as well as our history, statutory law, morality, and common sense—teach that racial prejudice stands apart. Therefore, even if the State were correct that various safeguards diminish the odds of racial bias infecting jury deliberations as effectively as they diminish the chances of having jurors who are intoxicated or partial to a litigant due a relative's past similar experience, it would not matter. The Sixth Amendment would still require an exception for the unique contaminant of racial bias. But the reality is even more compelling: The procedural tools the State identifies are, in fact, *less* effective in protecting against racial bias than against other forms of partiality. So the constitutional imperative here is actually all the more pressing.

The State protests that a constitutional safety valve for testimony revealing that racial bias infected deliberations would "undermine vital interests of the jury system." Resp. Br. 41. But neither the State nor its amici point to any actual harm that has materialized in the numerous jurisdictions that have long had the exception at issue. Nor does the State seriously confront the reality that *all* jurisdictions, including Colorado, already have exceptions to the general rule that jurors may not impeach their own

verdicts—and, again, it is undisputed that none of the potential harms the State identifies have arisen because of those exceptions.

That leaves a plain truth: Convicting someone of a crime because of his race tramples our most vital principles of liberty and equality. It destroys the "fundamental integrity of all that is embraced in the constitutional concept of trial by jury." *Turner v. Louisiana*, 379 U.S. 466, 472 (1965). States should not be allowed to tolerate such perversions of justice.

ARGUMENT

As the State recognizes, states may not enforce evidentiary rules where the rules impose constitutional harm "disproportionate to the ends that they are asserted to promote." Resp. Br. 18 (quoting *Holmes v. South Carolina*, 547 U.S. 319, 326 (2006)). Consequently, this Court must balance the infringement here on the right to an impartial jury against the state interests purportedly served by barring juror testimony describing racial bias during deliberations. *See* Petr. Br. 15-17. That balance tips decisively in petitioner's favor.

I. Colorado's Rule Barring Juror Testimony That Racial Bias Infected Deliberations Seriously Infringes The Right To An Impartial Jury.

The State argues that the factors identified in *Tanner v. United States*, 483 U.S. 107 (1987), and certain other structural aspects of the jury system "effectively address" the problem of racial bias infecting jury deliberations. Resp. Br. 19. The State is mistaken.

A. The *Tanner* Factors

1. *Voir dire.* The State places its greatest emphasis on voir dire. According to the State, racial bias will seldom penetrate the jury room if defense counsel skillfully conducts voir dire. Resp. Br. 20-30. This suggestion, however, is flawed in multiple ways.

a. As an initial matter, the State's contentions regarding sound defense strategy are misguided. The State, in particular, derides defense counsel here for demanding nothing beyond "[o]pen-ended questions" about potential partiality "that fail[ed] even to obliquely raise racial bias." Resp. Br. 27 But to borrow the United States' words in response to an equivalent suggestion:

> [There is] no reason for presuming that the general questions asked by the court were less likely to uncover prejudice against people of Mexican ancestry than . . more specific question[s]. Indeed, it may be that the general questions asked by the court were more effective than . specific question[s] would have been. . Here, the general questions asked allowed each juror to indicate his partiality, without being called upon to explain its basis or having it inferred from the nature of the question.

Br. for United States at 8, 24, *Rosales-Lopez v. United States*, 451 U.S. 182 (1981) (No. 79-6624) (footnote and internal quotation marks omitted). In other words, in light of the discomforting nature of being asked directly about one's racial views, defense

lawyers will often sensibly conclude that it is better to ask jurors general questions regarding potential bias than more pointed ones about race.[1]

No doubt defense lawyers may sometimes reach the opposite conclusion—that, even in garden-variety prosecutions where race should not be an issue, it is still worthwhile to have prospective jurors asked about the subject during voir dire. But does the State really think that *every* public defender, in *every* prosecution across the country—whether it be for shoplifting, assault, money laundering, or drunk driving—should flag at the outset of trials that he or she believes racial bias might influence the outcome? To say this would be "insulting to jurors," Pet. App.

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[1] This case illustrates the point. The State describes this as an "interracial" crime involving "a basic credibility choice" between the victims (the only eyewitnesses) and the alibi witness. Resp. Br. 22, 40 n.11. But petitioner never suggested race was relevant, and he never argued the victims lied. Instead, petitioner maintained simply that the victims' identification—springing, as it did, from a quick and stressful interaction, followed by a suggestive show-up—was "mistaken." Petr. Br. 5-6; *see also Stovall v. Denno*, 388 U.S. 293, 302 (1967) ("The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned."). That the victims testified they were "100% positive" petitioner was the perpetrator (Resp. Br. 6) does not undercut petitioner's decision to stick with the theme of misidentification. Research shows that expressions of certainty in situations like this do not actually correlate with increased reliability, and thus "can cause miscarriages of justice" when elicited at trial. Michael R. Leippe & Donna Eisenstadt, *Eyewitness Confidence and Confidence-Accuracy Relationship in Memory for People*, *in* 2 Handbook of Eyewitness Psychology 377, 418 (Rod C.L. Lindsay, et. al, eds., 2007).

11a n.5 (quoting *United States v. Villar*, 586 F.3d 76, 87 n.5 (1st Cir. 2009)), is putting it mildly. Moreover, to return to the United States' explanation in *Rosales-Lopez*, asking prospective jurors about their racial attitudes at the outset of a trial where there is "little to suggest that [the defendant's] race or national origin [i]s likely to play any material role in the jury's deliberations" unacceptably "runs the danger of injecting racial issues in a case where they would otherwise play no role." Br. for United States in *Rosales-Lopez* at 8, 24.

More generally, suggesting that every criminal case ought to commence with a formal dialogue regarding the importance of race hardly seems like a productive way to help the Nation move toward "a colorblind society in which race does not matter," *Fisher v. Univ. of Texas*, 133 S. Ct. 2411, 2427 (2013) (Thomas, J., concurring) (quotation marks and citation omitted). Remember that in the federal system and many others, *judges* typically conduct the actual questioning at voir dire, with counsel merely providing proposed questions. Especially under these circumstances, it is "quite conceivable that a thoroughly competent and fairminded district court judge could conclude that the asking of [questions about race], or the devotion of a substantial amount of the time to the inquiry, could well exacerbate whatever prejudice might exist without substantially aiding in exposing it." *Rosales-Lopez*, 451 U.S. at 195 (Rehnquist, J., concurring in the judgment).

In all events, recognizing a constitutional fail-safe for exceptional cases where racial bias was injected into deliberations is far better than implicitly requiring defense counsel in *all* future criminal trials

to introduce race at the outset. Defense lawyers should be able to continue to exercise their professional discretion concerning "whether or not [they] would prefer to have the inquiry into racial or ethnic prejudice pursued" at voir dire. *Rosales-Lopez*, 451 U.S. at 191 (plurality opinion). And where, as here, there is no good reason to have thought race should play any role in the outcome, defense counsel's decision not to question jurors specifically about race should be taken as entirely reasonable. *See id.*

b. Even when the defense strategically desires to probe specifically for racial bias during voir dire, the State skates over the fact that judges have "broad discretion" to prohibit such inquiries. *Ham v. South Carolina*, 409 U.S. 524, 528 (1973). Judges, in fact, often "understandably" do just that, to avoid "creat[ing] the impression 'that justice in a court of law may turn upon the pigmentation of skin [or] the accident of birth.'" *Rosales-Lopez*, 451 U.S. at 190 (plurality opinion) (second alteration in original) (quoting *Ristaino v. Ross*, 424 U.S. 589, 596 n.8 (1976)). Only when race is "inextricably bound up with" the issues at trial—such as when a black defendant claims white officers framed him for engaging in civil rights protests—must judges allow voir dire concerning potential racial bias. *Ristaino*, 424 U.S. at 597; *see also Ham*, 409 U.S. at 527.

Ignoring this reality, the State suggests that any defendant accused of victimizing someone of another race has a right to conduct voir dire on race. Resp. Br. 22. The interracial character of a crime, however, allows a defendant to conduct voir dire on race only in *capital* cases; in all other prosecutions, this Court has squarely held that the interracial nature of a

crime is *not* a "special circumstance" entitling the defense to demand such questioning. *Turner v. Murray*, 476 U.S. 28, 37-38 & n.12 (1986); *see also Ristaino*, 424 U.S. at 597. Unless this Court is prepared to overrule those decisions—and, indeed, to require courts to allow voir dire concerning race in every single criminal prosecution, *regardless of the race of the defendant and any victim*—the State's submission that voir dire is a panacea here fails.

c. Finally, the State overstates the efficacy of voir dire as a tool for exposing racial bias. Yes, jurors can sometimes be questioned "privately" or "indirectly" about their racial attitudes. Resp. Br. 25-26. But that does not mean defense counsel can always ferret out people who harbor racial animus. People disinclined to profess in open court that they hold racially discriminatory views will not necessarily divulge that information behind closed doors to judges and lawyers. They may even intentionally conceal their bias in hopes of getting on the jury and expressing it during deliberations. *See, e.g.*, *United States v. Henley*, 238 F.3d 1111, 1121 (9th Cir. 2001).

As evidence supposedly to the contrary, the State holds up the questionnaires of two venire members who, as the State puts it, "disclosed . . . that they were 'prejudice[d] at times' or had 'no tolerance.'" Resp. Br. 22. But in fact, Juror 36 indicated he had "no tolerance" for "*sexual assault*," and Juror 20 similarly stated that she was "prejudice[d] at times" in connection with saying anyone convicted of sexual assault deserves severe punishment. R. Seal., Jury Questionnaires at 80, 83 (emphasis added). Indicating that one takes a hard line against sexual assault is a far cry from conceding racially prejudice.

Another problem with the State's argument is that many people who pigeonhole others according to their racial identity do not even perceive their views as biased. *See Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016) ("Bias is . . difficult to discern in oneself."); *Smith v. Phillips*, 455 U.S. 209, 221-22 (1982) (O'Connor, J., concurring) (jurors "may be unaware" of their own racial bias). Indeed, the more biased potential jurors are, the *less* likely they are to perceive their stereotype-laden views as anything other than fact. And when people perceive their beliefs as fact, it does not matter whether they are asked in public or in private if they are prejudiced. Either way, they will remain silent.

To be sure, indirect questioning may occasionally expose the wrongheaded views of some of these individuals. But the efficacy of indirect inquiries is inherently limited; questions crafted as proxies to unearth something else cannot always elicit the actual information the questioner is seeking. Thus, try as defense counsel might, no amount of indirect questioning—even in an imaginary world with infinite time for voir dire—could identify every problematic juror. *See* Law Prof. Br. 12.[2]

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[2] The State, for example, suggests petitioner could have gained useful information by questioning potential jurors about any "dislike of people who aren't in the country legally." Resp. Br. 7; *see also id.* at 22. But people who disapprove of undocumented aliens do not necessarily have any quarrel with *legal* immigrants, much less Hispanic persons in general. Petitioner is a lawful permanent resident who came to the United States when he was seven years old and was almost thirty at the time of trial. His alibi witness is also a lawful permanent resident. Tr. 14 (Feb. 25, 2010).

The State responds that recognizing voir dire sometimes to be ineffectual "cannot be squared" with the fact (as noted above) that defendants sometimes have a constitutional right to question jurors about race. Resp. Br. 23. But the mere fact that defendants have a constitutional right to some procedure hardly suggests the procedure is so effective that related constitutional protections are unnecessary. Take the constitutional right to confrontation and cross-examination. This Court has called cross-examination "the greatest legal engine ever invented for the discovery of truth." *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987) (internal quotation marks and citations omitted). But, recognizing the limits even of that storied device, this Court has held that the prosecution must disclose material impeachment evidence, *United States v. Bagley*, 473 U.S. 667 (1985), and correct false testimony on its own, *Napue v. Illinois*, 360 U.S. 264 (1959). In short, it does not disparage a constitutional guarantee to recognize that related procedures are sometimes necessary to avoid breakdowns in the machinery of justice.

2. The State's cursory arguments concerning the other three *Tanner* factors largely rehash the musings of the Colorado Supreme Court, which petitioner has already answered. *See* Petr. Br. 21-24, 27-28. Nothing the State adds is persuasive.

a. *Observation during trial.* As petitioner has explained, observing jurors in the courtroom seldom protects against racial bias. Petr. Br. 21-22. The State notes that court personnel sometimes interact with jurors *outside* the courtroom. Resp. Br. 35. But any evidence arising from those interactions would be considered "external evidence" (a topic petitioner

turns to next), not evidence from observing the jury during trial.

b. ***External evidence.*** The State does not dispute that nonjuror evidence of racially biased statements made *during* deliberations rarely exists. The State maintains, however, that the ability to procure external evidence *before* deliberations begin can genuinely guard against racial bias infiltrating the jury room. As support, the State cites a smattering of cases where persons reported juror comments they overheard "at a bar," "a club," "a court restroom," and the like. Resp. Br. 33-34. It should be obvious that such fortuitous occurrences are a far cry from any meaningful systematic protection.

Nor is the State correct when it suggests (Resp. Br. 34-35) that the ability to scan jurors' "social media" accounts is a dependable substitute for the constitutional rule petitioner seeks here. "[T]o protect [jurors'] privacy," judges may "restrict, if not forbid," trial counsel from researching jurors' internet presence. *See, e.g.*, *Oracle Am., Inc. v. Google, Inc.*, 2016 WL 1252794, at *2 (N.D. Cal. Mar. 25, 2016). And in run-of-the-mill prosecutions, practical considerations weigh heavily as well. Defense counsel in Colorado, for example, typically receive jury questionnaires minutes before the beginning of voir dire, rendering it impossible to conduct internet research in time to challenge potential jurors for cause. And even when judges allow such searches and attorneys are able to conduct them, few people will display racial animosity on their publicly viewable social media pages anyway. (There is no reason to believe Juror H.C. did here.)

In any event, it would be unwise for this Court to deal with the timeless problem of racial bias by leaning on the current existence—much less the current privacy configurations—of various social media websites. It is anyone's guess what Facebook, for example, might look like even a few years from now.

c. *Pre-verdict juror reports.* As with the smattering of cases concerning external evidence, the handful of cases the State gathers involving pre-verdict juror reports (Resp. Br. 31-32) hardly demonstrates that defendants need not sometimes introduce post-verdict testimony to prove that racial bias infected deliberations. Juries are directed to evaluate the evidence in light of "common sense" and their "observations and experience in life." Petr. Br. 22 (quoting instructions reproduced at J.A. 55). And racial bias is often expressed in just those terms; Juror H.C., for example, described his views as arising from "his personal beliefs and everyday experience." Pet. App. 10a. Accordingly, jurors often view others' racially prejudiced remarks as part of a reasonable (if deeply disquieting) exchange of perceptions—or at least not so out-of-bounds as to warrant breaking ranks and reporting to the judge before issuing a verdict. Petr. Br. 23-24.

The State responds that jurors can be expressly instructed that racial bias is illegitimate and should not affect their deliberations. Resp. Br. 33. True enough, but juries are also typically instructed not to consider any external information or to succumb to improper outside influence. *See, e.g.*, J.A. 65. And yet, this Court has long recognized that such conversation in the jury room is so corrosive that

when jurors disregard those instructions and no one steps forward before the verdict is rendered, jurors must be permitted in post-trial proceedings to recount the misconduct. *See Remmer v. United States*, 347 U.S. 227, 228-30 (1954) (outside influence); *Mattox v. United States*, 146 U.S. 140, 142-51 (1892) (external evidence). The same reasoning applies here.

B. Other Purported Protections

None of the other structural features of the jury system the State mentions provides an efficacious barrier against racial bias.

1. The State argues the fair cross-section requirement and the prohibition against race-based peremptory strikes help counteract racial bias because "diverse groups deliberate longer and consider a wider range of information than homogeneous groups." Resp. Br. 36-39. There are two problems with this argument.

First, notwithstanding rules designed to prevent racial discrimination in jury selection, juries commonly are racially homogeneous. Demographics alone dictate this reality. Some 200 counties in the United States are over 97.8% white; 1,167 counties (about one-third of the entire country) are over 90% white.[3] Furthermore, even when significant minority populations are present, they are often substantially underrepresented in jury pools. *See* Hispanic Nat'l

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[3] *See* Niraj Chokshi, *Diversity in America's Counties, in 6 Maps*, Wash. Post (June 30, 2014); Philip Bump, *How the Most Heavily White, Black, and Hispanic Counties in America Voted in 2012*, Wash. Post (Jan. 20, 2015).

Bar Ass'n Br. 14-18 (detailing "acute" underrepresentation of Hispanics in New York, Houston, and elsewhere); Nat'l Congress of Am. Indians Br. 11-13 (detailing underrepresentation of Native Americans); Ashish S. Joshi & Christina T. Kline, *Lack of Jury Diversity: A National Problem with Individual Consequences*, American Bar Ass'n, Section of Litigation (2015).[4] It is no surprise, therefore, that cases are legion in which venire pools produce only one or two prospective minority jurors, and prosecutors, entirely consistent with *Batson v. Kentucky*, 476 U.S. 79 (1986), strike those individuals from presumptive juries. *See, e.g.*, Caren Myers Morrison, *Negotiating Peremptory Challenges*, 104 J. Crim. L. & Criminology 1, 39-40 (2014). That seems to have happened here.[5]

Even when juries have at least some measure of racial heterogeneity, that hardly guarantees racial prejudice will not influence deliberations. When someone makes a racially biased remark, others (particularly if outnumbered in the jury room) commonly seek to avoid conflict and keep quiet. *See* Petr. Br. 23-24. And even when a juror does speak up, it may not matter. Bias in just one member of a multi-member decision-making group corrupts the entire group's work, *see Williams*, 136 S. Ct. at 1909, and it is unlikely that jurors such as Juror H.C. can

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[4] http://www.americanbar.org/groups/litigation/committees/diversity-inclusion/news_analysis/articles_2015/lack-of-jury-diversity-national-problem-individual-consequences.html.

[5] The record here does not reflect the race of the jurors. But the State struck the only presumptive juror with a Hispanic surname. *See* Tr. 322 (Feb. 23, 2010) (striking Juror 15).

be persuaded to change their minds concerning views (supposedly) informed by their "personal beliefs" and decades of "everyday experience," Pet. App. 10a.

2. The State's reliance on the fact that courts typically require a unanimous vote of twelve jurors to convict is even farther afield. First off, the State neglects to mention that the Constitution does not require jury unanimity, and two states allow convictions by 10-2 votes. *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972). In these jurisdictions, juries may "reach a quorum without seriously considering minority voices, thereby effectively silencing those voices and negating their participation." American Bar Ass'n, *Principles for Juries and Jury Trials with Commentary* 24 (2005).

More fundamentally, as just noted, any counter-measure that requires jurors not only to confront their peers in an already stressful setting, but also to change those persons' minds, is of limited utility.

* * *

All in all, the State identifies various procedures and serendipitous occurrences that sometimes prevent people who harbor racial prejudice from serving on juries and influencing deliberations. But there is no avoiding the fact that, despite the criminal justice system's best efforts, there will be cases where jurors interject racial bias into the jury room and encourage others to find defendants guilty on that basis. The question is whether a substantial enough state interest justifies barring defendants in these grave and exceptional cases from introducing the evidence necessary to prove that occurred. Petitioner now turns to that issue.

II. No State Interest Justifies Barring Juror Testimony Offered To Prove That Racial Bias Infected Deliberations.

As petitioner has noted, no state has a categorical no-impeachment rule; every state has at least some exceptions to the rule against jurors' post-verdict testimony about deliberations. Petr. Br. 29-30. Indeed, over twenty jurisdictions already specifically allow jurors to testify to prove that racial bias infected deliberations. *Id.* at 30-32. And neither the State, the twelve other states that support it, nor the Solicitor General disputes petitioner's empirical assertion that none of these exceptions has caused any problems. Petr. Br. 33-45; *see also* Retired Judges Br. 3-7; Law Professors Br. 14-21; Nat'l Ass'n of Fed. Defenders Br. 15-25.[6]

Instead, the State and its amici offer entirely theoretical arguments in support of barring jurors from testifying regarding racial bias. But surely the Constitution requires more than unsubstantiated speculation before tolerating the unique toxin of

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[6] The twelve states' amicus brief quibbles over the number of states with specific exceptions for racial bias, saying (i) it is "pointless" to count states that have adopted these exceptions to satisfy the Sixth Amendment and (ii) it is improper to count states without state high court decisions directly on point. Indiana Br. 7-8. But insofar as the debate here turns on the practical question whether having an exception for racial bias "undermine[s] vital interests of the jury system," Resp. Br. 41, it does not matter *why* any given state adopted such an exception; it just matters whether a state has one. And as the amici states should know, intermediate court decisions and legislative rules can establish state law just as clearly as state high courts can.

racial prejudice in the criminal justice system. At any rate, none of the State's theoretical arguments withstands scrutiny.

1. ***Full and frank discussion.*** Citing *Tanner v. United States*, 483 U.S. 107 (1987), and *Warger v. Shauers*, 135 S. Ct. 521 (2014), the State maintains this Court has already decided that the interest in full and frank discussion must prevail here. Resp. Br. 43 & n.12. But neither case involved racial bias. And this Court has noted that principles not present in those cases sometimes dictate that ignoring juror testimony is "too high a price" to pay for preserving freedom of debate. *Clark v. United States*, 289 U.S. 1, 13-14 (1933); *see also Warger*, 135 S. Ct. at 529 n.3 ("There may be cases of juror bias so extreme" that the Sixth Amendment demands consideration of jury testimony recounting deliberations.); *McDonald v. Pless*, 238 U.S. 264, 268-69 (1915) (There may be instances in which juror testimony recounting deliberations "could not be excluded without 'violating the plainest principles of justice.'" (quoting *United States v. Reid*, 53 U.S. (12 How.) 361, 366 (1851))).

As petitioner has explained, our Constitution's singular antipathy toward racial prejudice is such a principle. Petr. Br. 17-19, 34-35. The State offers no real response, other than speculating that allowing juror testimony regarding racial statements could "drive racism underground." Resp. Br. 45. It is hardly apparent that would be a bad thing in the jury room. At any rate, it is probably wishful thinking. As noted above, people like Juror H.C. do not necessarily perceive their own views as bigoted. Nor are they likely to be aware of the niceties of no-impeachment

rules—especially against the backdrop of jurors' default right to publicize deliberations to all the world. *See* Petr. Br. 35-36. So biased jurors otherwise inclined to speak are unlikely to bite their tongues during deliberations, no matter what the rules regarding post-verdict testimony may be.

2. *Juror harassment.* The State parrots the Colorado Supreme Court's prediction that allowing post-trial testimony regarding racial bias "would 'incentivize post-verdict harassment of jurors.'" Resp. Br. 48 (quoting Pet. App. 15a). But this ignores the reality that harassment is not a problem in the numerous jurisdictions already allowing such testimony. *See* Petr. Br. 37. The State also ignores the effectiveness of established procedures in Colorado and elsewhere that regulate juror contact for purposes of administering other exceptions to no-impeachment rules. *See id.* at 37-38. All that is required here is for trial courts to apply the same restrictions to attempts by defense counsel to inquire about racial bias in the jury room—as the trial court did in this case. *See* Resp. Br. 11 n.6 (describing the court's "careful and through" management of post-trial proceedings); Petr. Br. 7-9 (same).

3. *Finality.* None of the State's attempts to defend its evidentiary bar in terms of finality is convincing.

The State first posits there is "little chance" that the meager number of reversals over the past several years is "representative" of the true impact of the racial bias exception in jurisdictions that already recognize it. Resp. Br. 47; *see* Petr. Br. 39 (recounting statistics). But neither the State nor its amici—despite their ready access to prosecutorial

information and records—offers any tangible reason to doubt the rarity of reversals on this ground. Nor is there any intuitive reason to doubt this reality; expressions of racial animus, especially in the course of solemn government service, are thankfully uncommon.

The State next complains that finality "is disrupted not only when a court actually disturbs a verdict but also when it allows inquiry into the verdict's validity." Resp. Br. 46. But, again, the State gives no reason to believe such inquiries into racial bias need to occur with any frequency. And when such inquiries do occur, courts can follow the longstanding procedures for administering Rule 606(b)'s exceptions for external evidence and improper influences. *See* Petr. Br. 39; Nat'l Ass'n of Fed. Defenders Br. 15-25.

The State responds that Rule 606(b)'s exceptions are different because they "do not reveal the jury's internal discussions." Resp. Br. 51. The State is mistaken. Those exceptions have always depended on juror testimony describing what was said, as well as "who learned or knew or participated" in any improper discussions during deliberations. Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 6:23, at 129 (4th ed. 2013); *see also Mattox v. United States*, 146 U.S. 140, 142-43 (1892) (considering juror affidavits recounting statements made "while the jury were deliberating of their verdict"). To be sure, the external-evidence and improper-influence exceptions do not permit any inquiry into individual jurors' "thought processes," Resp. Br. 52. But neither does the racial bias exception petitioner seeks. *See* Law Professors' Br. 16

(collecting case law from jurisdictions that recognize the exception).

Finally, the State suggests that allowing jurors to testify in rare instances where racial bias has led to conviction will give courts too much supervisory authority over verdicts, thereby stripping juries of their historical "independence." Resp. Br. 50. This argument stands the concept of jury independence on its head. The Framers insisted juries be independent "to prevent oppression by the Government," *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968), not to insulate arbitrary guilty verdicts from review. *See also* NAACP Br. 7-9. That is why acquittals are inviolate, *Evans v. Michigan*, 133 S. Ct. 1069, 1074 (2013), but judges may overturn guilty verdicts when a malfunction occurred or they simply "disagree[] with a jury's resolution of conflicting evidence and conclude[] that a guilty verdict is against the weight of the evidence," *Tibbs v. Florida*, 457 U.S. 31, 42 (1982); *see generally* Wayne R. LaFave, et al., Criminal Procedure § 24.11 (5th ed. 2009).

Even setting aside the State's historical inversion, there is no reason why our legal system would *want* to protect the ability of juries to render convictions on the basis of their race. "Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). It is, therefore, "an affront to justice to argue that a fair trial includes the right to discriminate against a group of citizens based upon their race." *Georgia v. McCollum*, 505 U.S. 42, 57 (1992). Put another way, a juror who urges others to convict someone based on racial bias "breaches the compact [requiring a verdict based

solely on the evidence] and renounces his or her oath." *J.E.B. v. Alabama*, 511 U.S. 127, 153 (1994) (Kennedy, J., concurring in the judgment). Such actions warrant denunciation and ameliorative measures, not insulation from scrutiny.

4. *Public confidence in the administration of justice.* The State does not disagree that allowing guilty verdicts driven by blatant racial prejudice to stand—in and of itself—would erode public confidence in the criminal justice system. It would be impossible to argue otherwise. But the State maintains there is nothing this Court can do about that, for mandating an exception to no-impeachment rules here but not in cases like *Tanner* and *Warger* "would appear to treat defendants unequally despite compelling reasons not to." Resp. Br. 49; *see also* Resp. Br. 54 ("Petitioner's approach would create disparities among defendants with other compelling Sixth Amendment claims.").

This argument ignores the volumes of constitutional case law that already differentiate racial stereotyping from other, less odious forms of bias. Neither the Equal Protection Clause nor the Due Process Clause, for example, expressly distinguishes racial bias from any other form of partiality. *See* U.S. Const. amends. V, XIV. But if there is one thing this Court has made clear when applying those provisions, it is that racial stereotyping causes "special harms" and "therefore warrants different analysis." *Shaw v. Reno*, 509 U.S. 630, 649-50 (1993); *see also* Petr. Br. 42-44 (discussing decisions treating race differently in context of composing grand juries, conducting voir

dire, and exercising peremptory challenges). That is all this Court needs to say in this case as well.

The public will readily understand the distinction. It would likely be puzzled if this Court said anything else.

CONCLUSION

For the foregoing reasons, the judgment of the Colorado Supreme Court should be reversed.

Respectfully submitted,

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